

FRANCES KUNKEL

IBLA 83-506

Decided May 8, 1984

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, disqualifying simultaneous oil and gas lease applications and barring participation in future selections.

Affirmed as modified and remanded for return of filing fees.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Applications: Filing

Where an applicant for a simultaneous oil and gas lease submits a folded automated application, such application is properly deemed unacceptable under 43 CFR 3112.3(a) (48 FR 33679 (July 22, 1983)), and the applicant is entitled to a refund of filing fees after assessment of a \$75 processing fee.

APPEARANCES: James A. Holtkamp, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Frances Kunkel has appealed from a February 17, 1983, decision of the Wyoming State Office, Bureau of Land Management (BLM), disqualifying certain simultaneous oil and gas lease applications and notifying her that she would be barred from future participation in the simultaneous system until she paid the Government \$26,525.

The BLM decision stated:

During the January simultaneous oil and gas filing period, you submitted applications and five checks to cover filing fees. These checks have been returned uncollectible because payment was stopped. Enclosed are bills to cover these uncollectible remittances, specifically:

<u>Your Check</u>	<u>Amount</u>	<u>Service</u>	<u>Our Bill</u>	<u>Amount</u>
43	\$ 1,725.00	\$10.00	A149885	\$ 1,735.00
44	5,250.00	10.00	A149886	5,260.00
45	375.00	10.00	A149887	385.00
46	4,500.00	10.00	A149888	4,510.00
47	<u>14,625.00</u>	<u>10.00</u>	A149889	<u>14,635.00</u>
Totals	\$26,475.00	\$50.00		\$26,525.00

Payment must be made within thirty (30) days. If payment is not received within 30 days, interest will accrue at the rate of 13% on the amount due.

In accordance with 43 CFR 3112.2-2(c), 1/ an uncollectible remittance shall result in disqualification of all filings covered by it. The filings covered by your above-itemized checks are thereby disqualified. In addition, the above-cited regulation requires that the debt shall be paid before the applicant is permitted to participate in any future selection. 2/

On appeal appellant provides the following factual circumstances to explain the stop payment order:

3. In January, 1983 I prepared for filing with the Wyoming State Office of the Bureau of Land Management five (5) applications for simultaneous drawing covering parcels in five states. After completing the applications, I folded them and inserted them in one envelope along with five checks, one for each state in which the applications were being filed. I then mailed the envelope, postage prepaid, late on Thursday, January 13, 1983.

4. After mailing the envelope, I realized that by folding the applications I may have rendered the applications invalid because of the instructions on the applications not to fold them. Accordingly, early on Monday, January 17, 1983, I called a representative at the Wyoming State Office of the Bureau of Land Management and requested that I be allowed to withdraw the applications. I was told that if the applications were withdrawn the filing fee would be retained. The BLM representative also refused to tell me whether the applications had been received by BLM.

1/ Departmental regulation 43 CFR 3112.2-2 (1982) governing filing fees for simultaneous oil and gas lease applications specifies:

"(a) Each filing shall be accompanied by a \$75 filing fee.

* * * * *

"(c) An uncollectible remittance covering the filing fee(s) shall result in disqualification of all filings covered by it. In such a case, the amount of the remittance shall be a debt due to the United States which shall be paid before the applicant is permitted to participate in any future selection." The oil and gas regulations were revised in their entirety effective Aug. 22, 1983. 48 FR 33648 (July 22, 1983). The above regulation is found at 43 CFR 3112.2-2 of the revised regulation.

2/ Subsequently, by letter dated Apr. 21, 1983, BLM informed appellant that she was due a refund because of parcels deleted for the January 1983 filing period. BLM offset the refund against the amount owing and informed Kunkel that her "total liability to date," including interest was \$25,203.32. On May 23, 1983, Kunkel paid that amount under protest.

5. On January 17, 1983, I instructed the bank on which I had drawn the checks to stop payment on the same.

(Affidavit of Frances Kunkel, Exh. A to Statement of Reasons). BLM has not filed any response disputing these facts; therefore, we accept them as true.

The Board recently dealt with a situation involving an uncollectible remittance in Marceann Killian, 79 IBLA 105 (1984). In that case Killian had received first priority for eight parcels in the May 1983 simultaneous drawing. In each case the application was disqualified because the filing fee was paid with an uncollectible remittance. Killian had submitted checks for filing fees drawn on a joint account and her joint tenant had removed funds such that at the time the checks were presented for payment insufficient funds existed in the account. This Board applied the regulations at 43 CFR 3112.2-2(c) and stated that: "Once a selection has taken place in which a filing covered by an uncollectible fee is included, a debt has accrued. The penalty provided by the regulations for submitting a payment that is uncollectible is disqualification of the filings it covered." Id. at 107. The Board found that it was bound by the regulation even though in a February 10, 1984, memorandum from the Director, BLM, to the Wyoming State Director, the State Office was directed to handle applications with uncollectible remittances under 43 CFR 3112.2, 48 FR 33679 (July 22, 1983), as though they had been received without fees. The memorandum stated an intent to amend the regulation at a future date. Id. at 108 n.5.

[1] The present case is distinguishable on its facts from the Killian case. In Killian there was no deficiency in the applications themselves; the applications were rejected after receiving priority because of an uncollectible remittance. Here, the applications were deficient. Appellant realized after mailing her applications that she had folded them. She sought to have them returned to her. When BLM refused, she stopped payment on her checks. Her applications were not included in any drawing. She received no priority. Based on the regulations, we must determine the consequences of her actions.

Subsequent to the filing period involved in this case, BLM adopted revised regulations specifically designed for administration of the automated simultaneous filing process. The regulations were revised to provide at 43 CFR 3112.3 that:

(a) Any Part B application form which, in the opinion of the authorized officer:

(1) Is not timely filed in the Wyoming State Office; or

(2) Is received in an incomplete state or prepared in an improper manner; or

(3) Is received in a condition that prevents its automated processing; or

(4) Is received with an insufficient fee: shall be returned to the remitter as unacceptable. [Emphasis added.]

48 FR 33679 (July 22, 1983). Subsequently, the regulation at 43 CFR 3112.3(a) defining an "unacceptable" application was further revised:

(a) Any Part B application form shall be deemed unacceptable and a copy returned if, in the opinion of the authorized officer, it:

(1) Is not timely filed in the Wyoming State Office; or

(2) Is received in an incomplete state or prepared in an improper manner that prevents its automated processing; or

(3) Is received in a condition that prevents automated processing; or

(4) Is received with an insufficient fee. [Emphasis added.]

49 FR 2113 (Jan. 18, 1984).

In Shaw Resources, Inc., 79 IBLA 153, 175-76, 91 I.D. 122, 134-35 (1984), the Board held that the term "prevents automated processing" includes "any deficiency which prohibits the computer from fully completing the automated program." In the context of the automated simultaneous filing procedure where one Part B application may describe numerous parcels involving thousands of dollars in filing fees, the distinction between an unacceptable and a rejected application is significant. Where an application is rejected, all filing fees are retained; but where an application is deemed unacceptable, all filing fees submitted with the application form are returned after assessment of a \$75 processing fee. Id. at 176, 91 I.D. at 135; Thomas Connell, 80 IBLA 135 (1984).

If the new regulations were applied to this case, the folding of the applications would render them unacceptable. See 43 CFR 3112.3(a)(3) (48 FR 33679 (July 22, 1983)). However, the unacceptable applications in this case were accompanied by an uncollectible remittance. The regulation at 43 CFR 3112.2-2 (48 FR 33678 (July 22, 1983)) provides that applications accompanied by an uncollectible remittance shall result in disqualification and that the amount of the remittance shall become a debt due and owing the Government. The result of applying the first regulation would be that BLM would retain \$375 (\$75 times 5 applications) and the remainder of appellant's remittance would be returned to her. If the second regulation were applied, BLM would retain the \$25,203.32 submitted by appellant under protest.

In this case appellant stopped payment of her checks based on BLM's representation that she could not withdraw her applications and that BLM would retain her filing fees. If appellant had not realized that she had folded her applications, presumably BLM would have applied the procedure it enunciated in a notice at published in the Federal Register on November 26, 1982. That notice stated:

By notice in the Federal Register on November 12, 1981 (46 FR 55783 et seq.), the Bureau of Land Management (BLM)

established a requirement that all applications filed on BLM Form 3112-6 and 3112-6(a) (OMB No. 1004-0065) for noncompetitive oil and gas leases issued by the automated simultaneous drawing system must be completed and received in a condition that the authorized officer determines would permit automated processing.

This notice is hereby published to draw direct emphasis to this requirement. Automated simultaneous oil and gas lease application forms 3112-6 and 3112-6a which are folded, spindled, or otherwise mutilated, which are incorrectly completed in any manner, which indicate an improper or incomplete Social Security Number, Employer Identification Number, BLM Applicant Number or other identification number, which contain information on Part B (Form 3112-6a), that does not correctly correspond to information on Part A (Form 3112-6), which contain entries that are obscured by incomplete erasure, stray marks, tape or other foreign substances, or which in any other way prevent fully automated processing will be considered unacceptable. The public is hereby notified that effective immediately applications shall be rejected without right of appeal or protest and the nonrefundable filing fee shall be retained to cover processing costs. [3/ Emphasis added.]

47 FR 53508 (Nov. 26, 1982). Thus, appellant was on notice from BLM that a folded application would be "rejected" without the right of appeal and the filing fee retained.

We do not believe under the circumstance of this case that appellant should be penalized because she stopped payment on her checks. For the purposes of this decision, we will apply 43 CFR 3112.3(a)(3) (48 FR 33679 (July 22, 1983)), as amended, 49 FR 2113 (Jan. 18, 1984). ^{4/} Thus, we find that appellant's folded applications were unacceptable and that this finding of unacceptability controls the outcome of the appeal. The fact that the applications were accompanied by an unacceptable remittance is a secondary consideration which in this case is overridden by the unacceptable applications.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified in that we find the applications unacceptable,

^{3/} As we stated in Shaw Resources, Inc., *supra* at 165 n.4, with respect to this notice: "The authority by which the Acting Associate Director, BLM, purported to deny applicants the right to appeal granted by the Secretary of the Interior pursuant to duly promulgated regulations is nonexistent."

^{4/} Under longstanding Departmental practice, in the absence of third-party rights or countervailing considerations of public policy, amended regulations may be applied to matters pending before the Board where such amended regulations will benefit an appellant. See James E. Strong, 45 IBLA 386 (1980); Henry Offe, 64 I.D. 52 (1957).

and the case is remanded for return of filing fees after an assessment of \$375.

Bruce R. Harris
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Will A. Irwin
Administrative Judge

